NACWA
A Clear Commitment to America's Waters



November 8, 2010

Water Docket
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Submitted via *www.regulations.gov*

**Re: Docket ID EPA-R03-OW-2010-0736**

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to comment on the draft Chesapeake Bay Total Maximum Daily Load (TMDL). NACWA's public wastewater treatment agency members, including many facilities within the Chesapeake Bay, treat and reclaim a majority of the wastewater generated each day nationwide. In addition to wastewater treatment, many NACWA members have responsibility for implementing municipal separate stormwater sewer system (MS4) programs, which are permitted under the MS4 National Pollutant Discharge Elimination System (NPDES) program, and for some communities management of combined sewer overflows (CSOs) remains an important consideration. NACWA members recognize the potential impacts of these discharges on the Chesapeake Bay and are committed to addressing their relative contributions toward improving Bay water quality equitably with other sources.

Publicly owned treatment works (POTWs), most of which have already made significant strides in reducing their contribution of nutrients, and MS4 utilities will be most directly affected by the proposed TMDL. At its foundation, EPA's approach to the Bay promises a more holistic program capable of looking across the watershed to address the variety of sources impacting the bay. However, effective TMDLs require fair and cost-effective allocations to all sources and must not over-burden municipal dischargers simply because the authority to address the other sources is lacking. However, achievement of the load reductions in EPA's proposed TMDL falls squarely, and inequitably, on the backs of the POTWs and MS4s in the Bay watershed.

Clearly more work is needed to improve the health of the Chesapeake Bay, but EPA's arbitrary deadlines and aggressive schedules are setting up the process for failure. Underlying all the debate about allocations, reasonable assurance, and

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backstops is a complex model and volumes of data which stakeholders and the public have simply not had enough time or opportunity to review. EPA should provide the public with more time to review the models and the draft TMDL in order to interact with EPA and support the development of meaningful comment on the TMDL. A 45-day comment deadline is not sufficient for such a complex watershed and TMDL. Although EPA is not under any legal obligation to finalize the TMDL by its December 31, 2010 deadline, the Agency denied the many requests it received for an extension of the comment deadline. It will also be difficult, if not impossible, for EPA to carefully consider comments and make revisions to the TMDL by the end of the year. Given the enormous regional and national implications of the TMDL, EPA should allow more time for public comment and more time for itself to consider public input.

While POTWs, MS4s, and other stakeholders in the Bay watershed are more closely following EPA's TMDL development and can provide the best perspectives on how the Agency's actions will impact the clean water community, elements of the TMDL demand attention from a national level. NACWA is concerned about the unknown accuracy and precision in the science underlying the TMDL, EPA's requirement for providing reasonable assurance, the load reductions imposed on POTWs and MS4s in contrast to other significant sources, the regulatory instability that results from EPA's threats of future reductions, and the lack of consideration for cost-effectiveness and available funding in the TMDL. These concerns are detailed below.

## Modeling Framework

The Chesapeake Bay TMDL is based on complex models that simulate nutrient and sediment pollutant load sources and the associated water quality and biological responses. EPA has not provided the public with a thorough explanation of how the models work, the degree of reliability associated with the model output and how the model's limitations impact the TMDL. In fact, EPA has not made all of the models themselves available for sufficient review by the regulated community. As EPA admits in the TMDL, "the models produce estimates, not perfect forecasts. Hence, they reduce, but do not eliminate, uncertainty in environmental decision making." (p. 5-15) Despite the effort EPA has made to calibrate the models with monitoring data, EPA has not quantifiably qualified the limitations in the modeled results for the incredibly complex ecosystem of the 4,480-square-mile Chesapeake Bay and its 64,000-square-mile watershed. Therefore it is unknown whether the reliability of the models is acceptable for developing such a TMDL. Since the TMDL will affect so many entities and will be extremely expensive to implement, EPA must clarify the limitations of the model (accuracy, precision, etc.) and its outputs and provide a complete analysis of how these limitations could affect the nutrient and sediment allocations and the costs of implementing the TMDL and how these limitations are quantifiably addressed in the TMDL.

## Reasonable Assurance Requirements

The Agency is on tenuous legal footing with its approach to ensuring the TMDL is implemented. Implementation plans associated with a TMDL are not part of the TMDL itself and, thus, are not subject to EPA approval. Pursuant to EPA's own regulations, a TMDL is the sum of the wasteload and load allocations that allow a body of water to meet water quality standards. 40 C.F.R. § 130.2(i). Section 303(d)(2) of the Clean Water Act (CWA) requires states to incorporate approved TMDLs into the water quality management plans that the states maintain under section 303(e). This framework is carried through in EPA's existing TMDL regulations as well as its 1997 guidance document on TMDL implementation. *See* 40 C.F.R. § 130.7(a) and "New Policies for Establishing and Implementing Total Maximum Daily Loads" (1997 Guidance). The 1997 Guidance does not suggest that implementation plans are subject to EPA approval or that the Agency has

authority to require reasonable assurance. The courts have consistently held that, under current CWA authority, the states have primary responsibility for implementing TMDLs, not EPA.

EPA seems to rely on CWA Section 117(g) (from the "Chesapeake Bay Restoration Act of 2000,"enacted as Title II of the Estuaries and Clean Waters Act of 2000 (P.L. 106-457)) to claim authority over implementation plans. In the case of the Bay, EPA is asserting authority over the Watershed Implementation Plans (WIPs) that EPA has required each Bay state to submit to the Agency, outlining how the necessary load reductions will be achieved. These WIPs were required to provide "reasonable assurance" that nonpoint source loading reductions will be achieved to meet the TMDL. EPA bootstraps "reasonable assurance," a concept created by EPA in its 1997 Guidance, into a legal rationale for judging states' WIPs.

"Reasonable assurance" is a concept that does not exist in either the CWA or EPA regulations. Under its 1997 guidance EPA wanted "reasonable assurances" that load allocations will be met if relied upon to establish point source wasteload allocations, and encouraged submission of implementation plans to EPA. The 1997 Guidance does not purport to make implementation plans subject to EPA approval or to give EPA authority to require reasonable assurance. Despite these limits, in the draft Bay TMDL, EPA goes even further than its 1997 Guidance and asserts that a TMDL must provide "reasonable assurance that the TMDL's LAs will be achieved," which "depends on whether practices capable of reducing the specified pollutant load (1) exist; (2) are technically feasible at a level required to meet allocations; and (3) have a high likelihood of implementation within a given period."

NACWA believes that EPA must acknowledge that the states, under current CWA authority, have the lead on TMDL implementation and that EPA's expectations for "reasonable assurance" must better reflect the legal and political realities of the Bay states. The states must have sufficient time to develop the programs and legislation necessary to put the needed controls in place. Further, the Bay TMDL is using two year "milestones" for each state to track progress; this should be sufficient reasonable assurance that the states will not significantly deviate from their plans and goals. The backstop measures imposed by EPA on the states also ignore local conditions and requirements and, in some cases, may lead to degradation of local waters. This contradicts the restoration goals of the TMDL, and therefore EPA backstops should not override the states' implementation of the TMDL that more appropriately considers local conditions.

## Allocations for POTWs

Wasteload allocations (WLAs) for POTWs must be stable to avoid repeated, extremely expensive upgrades to wastewater treatment plants that present an unreasonable burden to ratepayers. Under the current tributary strategies for reducing nutrient loads to the Bay, POTWs have already made significant investments to upgrade treatment facilities to meet these load reduction requirements. As stated in EPA's Section 202a report, *The Next Generation of Tools and Actions to Restore Water Quality in the Chesapeake Bay*, issued in response to Executive Order 13508, "Over 90 percent of nutrient reductions needed to reach the wastewater treatment facilities' basinwide loading caps are expected to be achieved by 2010." The report also acknowledges that "it would be very expensive to further reduce loadings from municipal and industrial wastewater dischargers below the established facility-specific cap loads in the tributary strategies."

EPA has not only proposed to reduce WLAs for POTWs in the initial TMDL, but also could "require additional reductions of loadings from point sources [by] revising the final December 2010 Chesapeake Bay TMDL to reallocate additional load reductions from nonpoint to point sources of nutrient and sediment pollution, such

as wastewater treatment plants," to ensure that "jurisdictions develop and implement appropriate WIPs, attain appropriate 2-year milestones of progress, and provide timely and complete information to an effective accountability system for monitoring pollutant reductions." (p. 7-11) This continued threat of additional nutrient controls does not provide the regulatory stability that the Bay community needs. It is wasteful and inappropriate to expect frequent modification or reconstruction of major facilities, absent a major new health or ecological risk that needs to be urgently addressed. A major modification at a POTW should bring 10 or 20 years of stability prior to different or incompatible upgrade requirements being imposed.

These additional point source reductions will have very little environmental benefit while presenting tremendous financial burdens on POTWs and their communities to add additional nutrient controls to facilities that were recently upgraded. Furthermore, as nutrient control approaches the limits of technology, the consumption of energy and chemicals increases dramatically and concerns emerge regarding offsetting environmental impacts overall such as greenhouse gas emissions. Severe limits on POTWs will also encourage increased reliance on on-site disposal systems, such as septic systems, that are far less efficient than centralized treatment, and drive population growth and development away from existing urban areas with advanced centralized treatment, leading to more environmental problems.

## Lack of Available Funding

The TMDL does not consider the cost-effectiveness of various nutrient and sediment controls and largely ignores the enormous cost to implement the proposed nutrient reductions. Combined with the aggressive schedule for meeting the TMDL goals, the cost burden on Bay watershed communities for meeting their load reductions will no doubt push beyond the limits of affordability. Combined with the other regulatory mandates these communities must meet, the TMDL simply does not reflect economic reality.

For stormwater, even EPA's own estimates put the cost of retrofitting at close to $8 billion annually for the Bay watershed. The actual costs will likely be significantly higher than that, particularly because EPA's backstop for stormwater calls for cities to meet aggressive new performance standards for 50 percent of urban lands through redevelopment requirements and retrofits. The requirement for retrofits is particularly concerning to NACWA, as the costs to cities to replace existing stormwater management infrastructure will be severe and will be on top of significant sums already being spent to meet combined sewer overflow and sanitary sewer overflow consent decrees.

Improved water quality in the Bay can and must be achieved in a more cost-effective manner by controlling nonpoint sources, particularly agriculture. As stated in the draft TMDL, "agriculture is the largest single source of nitrogen, phosphorus, and sediment loading to the Bay through applying fertilizers, tilling croplands, and applying animal manure. Agricultural activities are responsible for approximately 44 percent of nitrogen and phosphorus loads delivered to the Bay and about 65 percent of sediment loads delivered to the Bay." (p. 4-32) Air sources are also significant sources of nitrogen, contributing "about one-third of the total nitrogen loads delivered to the Chesapeake Bay by depositing directly onto the tidal surface waters of Chesapeake Bay and onto the surrounding Bay watershed." (p. 4-35) Forest lands are also significant contributors of nutrients and sediments. These nonpoint sources must be controlled in proportion to their contributions to pollution in the Bay. Neglecting proportionate controls on nonpoint sources while requiring continued reductions from POTWs and MS4s will place an unfair burden on municipal dischargers and result in a major waste of increasingly limited municipal resources.

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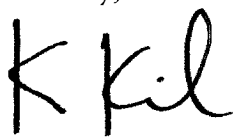
Thank you for your consideration of NACWA's comments on the draft TMDL for the Chesapeake Bay. Please contact Cynthia Finley at 202/296-9836 or *cfinley@nacwa.org* if you have any questions.

Sincerely,



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